Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	**FCC 99-390**
	)	**MM Docket No. 99-360**
Public Interest Obligations of TV Broadcast Licensees	)	

COMMENTS OF THE ALLIANCE FOR BETTER CAMPAIGNS, THE BENTON FOUNDATION, THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, CAMPAIGN FOR AMERICA, THE CENTER FOR MEDIA EDUCATION, COMMON CAUSE, THE CREATIVE COALITION, DEMOCRACY 21, THE INTERFAITH ALLIANCE, KIDSVOTING USA, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE MEDIA ACCESS PROJECT, THE NATIONAL CIVIC LEAGUE, THE NATIONAL COUNCIL OF CHURCHES OF CHRIST OF THE USA, PEOPLE FOR THE AMERICAN WAY FOUNDATION, PUBLIC CAMPAIGN, PUBLIC CITIZEN, ROCK THE VOTE, and USPIRG

Elizabeth Daniel
Brennan Center for Justice
at New York University School of Law

Counsel for the Alliance for Better Campaigns, *et al.*
161 Avenue of Americas
Suite 500
New York, New York 10013
(212)998-6730

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The Alliance for Better Campaigns, the Benton Foundation, the Brennan Center for Justice at New York University School of Law, Campaign for America, the Center for Media Education, Common Cause, the Creative Coalition, Democracy 21, the Interfaith Alliance, KidsVotingUSA, the League of Women Voters of the United States, the Media Access Project, the National Civic League, the National Council of Churches of Christ of the USA, People for the American Way Foundation, Public Campaign, Public Citizen, Rock the Vote, and USPIRG ("Alliance, *et al.*") respectfully submit this comment in response to the Commission's December 15, 1999, Notice of Inquiry on the Public Interest Obligations of TV Broadcasters (FCC 99-390). We urge the Commission to adopt a rule requiring television broadcasters to set aside a reasonable amount of time for candidates to appear on broadcast stations free of charge during the election season. A free time requirement would ensure that citizens have access to the information they need to choose their representatives while also furthering the broadcasters' long-standing, but oft-neglected, obligation to serve the public interest. In addition, such a rule would refine and clarify the broadcasters' public interest obligations in light of the transition to digital

television and the Congressional mandate that all new licenses granted for digital television be limited to existing broadcasters. 47 U.S.C. § 336(a).

Political campaigns, as they appear on broadcast television, are dominated by 30-second ads and 8-second sound bites, creating a critical deficiency in the quality of our democratic discourse and limiting access to the most important medium for electoral communication to those candidates with the funds to buy their way onto the air. We believe that a requirement of free time is a major step toward remedying these deficiencies. Such a requirement would enhance political discourse and better educate the voting public by guaranteeing blocks of time for candidates to address the public from the stage most accessible to the voting public, broadcast television. The rule should guarantee access for state and local candidates, as well as federal candidates, but the actual structure of the requirement should be developed by Commission.

We file this comment primarily to demonstrate that a free time requirement is clearly within the Commission's authority, and to show that free time is not only permitted by the Constitution but also furthers important First Amendment values. We recommend that the Commission use its expertise to determine the most effective way of structuring the free time requirement. The requirement, properly structured, would be a significant contribution to the public interest in an area essential to our democracy — elections — and it would neither unduly burden the broadcasters nor be particularly disruptive of broadcasters' schedules or editorial discretion.

INTRODUCTION

As communications technology hurtles through changes, developing and discarding audiences, broadcast television stands in a unique and powerful position — it is the one medium that can reach almost every person in the country. As the broadcasters recognize, broadcast television remains "the only mass medium that can bring tens of millions — even hundreds of millions — of viewers together. Only the NBCs, ABCs, and CBSs of the world can provide a shared experience that affects and influences our collective identity as a nation." Robert C. Wright, CEO of NBC, National Press Club Speech, *Federal News Service* (Jan. 24, 2000). By tradition, by power, and by prevalence, then, broadcast television serves as the primary arena where the public debate of our democracy takes place.

This omnipresence is even more important during elections because broadcasting is the one medium that reaches everyone; more than 20 percent of American households do not have cable television, but almost everyone has access to broadcast television. *Cable Industry Facts at a Glance 1999* (visited March 24, 2000) <http://www.ncta.com>. More importantly, broadcasting targets and reaches the public as a whole, while cable, with its diversity of programming, is a niche medium that reaches news junkies in one slot, sports fans in another, and, with a click, music buffs in still another. Network television remains the only medium that guarantees audiences in the multimillions. The average combined nightly audience for CNN, MSNBC, and Fox News is only one million viewers, while the three nightly network newscasts have 30 million viewers every night. Terry Jackson, *Cable News Outlets Plan to Keep Issues Alive*, Miami Herald, March 14, 2000. Thus, even as cable television and its news programming in particular are increasing in prominence, broadcast television remains our nation's public square.

The broadcasters have achieved and maintained this special position through a long history of preferential treatment by the government. They received their licenses for free, cable television systems "must carry" local broadcast stations, and, now, the incumbent licensees receive exclusive access to valuable new licenses for digital television.

Because of this special treatment and their special position, broadcasters have a unique obligation to provide forums for candidates to discuss and debate their ideas during the campaign season. More and more, however, broadcasters are failing to meet that obligation. In recent years, the amount of "candidate-centered" programming has plummeted, and coverage has shifted increasingly away from issues to discussions of tactics and strategy. That is when elections are covered at all. More and more, local television news shows give little, if any, coverage to their local and state elections. Some local broadcasters provide no news coverage for local elections. The keepers of our public square are neglecting their duty to provide time and space for political discourse.

Democracy is more than niche programming. Broadcast television can and should serve as the nation's public square during elections. Broadcasters have a duty to cover political campaigns and to provide a forum where the issues and candidates in the campaigns will reach voters. The Commission has the authority to require the broadcasters to meet at least part of this obligation by providing free time for candidates at the local, state, and federal level. The requirement does not violate the First Amendment; it furthers important First Amendment values.

ARGUMENT

The public trustee scheme that created the current broadcast industry permits the Federal Communications Commission to require broadcasters to make a significant contribution to a more in-depth discussion of campaign issues by providing free time for candidates on their stations. The Supreme Court has long recognized that the government may "seek to assure that the public receives through [the broadcast] medium, a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." *FCC v. League of Women Voters of Calif.*, 486 U.S. 364, 375 (1984). Even a cursory review of current television news demonstrates that broadcasters are not covering political campaigns adequately or, in some cases, at all, and that campaign discourse is dominated by 30-second ads and 8-second sound bites. Thus, the public is *not* receiving through the broadcast medium information of "public importance" as it relates to elections. By imposing a free time for candidates requirement on broadcasters, the FCC would make a significant step toward remedying this deficiency in the public trustee system and would enhance our democratic process.

In this comment, we first discuss a fundamental tenet of the broadcasting regime — that broadcasters are public trustees with a special duty to present political broadcasts. Second, we show that a free time requirement fits squarely within the FCC's authority to refine the public interest obligations of broadcasters. Finally, we demonstrate that the requirement is a reasonable exercise of the FCC's authority because it promotes robust debate during election season, an important First Amendment value, without improperly infringing on the First Amendment rights of broadcasters.

I. BROADCASTERS ARE PUBLIC TRUSTEES WITH A SPECIAL DUTY TO PRESENT POLITICAL BROADCASTS.

It is undisputed that when a broadcaster accepts its franchise — that is, the free and exclusive use of a part of the public airwaves — that franchise is burdened by enforceable public obligations. *CBS v. FCC*, 453 U.S. 367, 395 (1981). The relationship renders broadcasters public trustees "given the privilege of using scarce radio frequencies as proxies for the entire community [and] obligated to give suitable time and attention to matters of great public concern." *Red Lion Broadcasting v. FCC*, 396 U.S. 367, 394 (1969). As a part of their license, the broadcasters are charged with serving the "public interest." Because they are the trustees of a resource that is crucial for the functioning of our democratic process, the broadcasters have a particular obligation to present political broadcasting. A requirement that they provide free time for political broadcasts is a valid and reasonable regulation of the public interest obligation.

A. Broadcasters Are Trustees with Enforceable Public Obligations.

In understanding the broadcasters' role as "trustee," it is instructive to understand not just the history of the concept, but also the extent of broadcasters' benefit from this role and the repeated, explicit link between their preferred positions and their obligation to serve the public interest. Broadcasters have always received a very valuable resource — a license to use the electromagnetic spectrum without interruption — for free. The 1934 Act established that licensees' use of the electromagnetic spectrum could be granted or renewed only after a determination that "the public interest, convenience, and necessity will be served." 47 U.S.C. § 307(b).[1] Despite changes in the regulatory structure that have allowed licenses for other parts of

[1] The public interest requirement was created by the Radio Act of 1927 and carried over into the Communications Act of 1934.

the spectrum to be sold or auctioned by the government,[2] the promise to serve the public interest remains the broadcasters "consideration" for their license.

In the Cable Television Consumer Protection and Competition Act of 1992, Congress fortified the special position of broadcasters by requiring cable operators to dedicate some of their channels to local broadcast television stations. *See* 47 U.S.C. § 534(b)(1)(B). These "must-carry" rules were created to assure "the economic viability of free local broadcast television and its ability to originate quality local programming." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 634 (1994). Again, broadcasters receive this preferential treatment because of their public service obligation. *Id.* As noted in a Senate Committee Report on the Cable Act, the "must carry" rules are justified "because television broadcasting plays a vital role in serving the public interest . . . [including] public affairs offerings . . . ." S. Rep. No. 102-92, at 41-42 (1992). [3]

Time and changing technology have not altered rules of the trustee relationship. With the Telecommunications Act of 1996, Congress affirmed and, in a sense, expanded this unique relationship. Congress granted existing broadcast license holders exclusive rights to the additional spectrum space that would be created by the transition to digital television. Congress explicitly limited all licenses to existing license holders, eschewing the opportunity to auction the spectrum space. *See* 47 U.S.C. § 336(a). Again, instead of requiring broadcasters to pay for this expansion of their franchise, the government premised the award on the broadcasters' "obligation to serve the public interest, convenience, and necessity." 47 U.S.C. § 336(d); *see id.* § 336(b)(5)

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[2] Other commercial users of the spectrum — most prominently today, cellular telephone and personal communication services — must pay for their access. *See* 47 U.S.C. § 309(j).

[3] The statutes and regulations relating to children's television also reflect and reaffirm the broadcasters' status as public trustees. For instance, in the Children's TV Act of 1990, Congress directed the Commission when reviewing license renewals to "consider the extent to which the licensee . . . has served the education and informational needs of children." 47 U.S.C. § 303b(a)

(directing the Commission to prescribe regulations related to the additional licenses "as may be necessary for the public interest, convenience, and necessity").[4] Congress has explicitly exempted these new channels from the authority it has given the Commission to auction broadcast licenses in the future. *See* 47 U.S.C.§ 309(j)(2)(B) (Balanced Budget Act of 1997).

B. Political and Campaign Broadcasting Are Basic Elements of the Public Interest Obligation.

Just as there can be no doubt that the broadcasters have a public interest obligation, it is indisputable that presenting programming on politics and public issues is at the core of the obligation. Along with children's broadcasting,[5] political broadcasting is the one area where Congress and the Commission have demonstrated a specific concern about the broadcasters' performance under the public interest standard.

Since the beginning of modern broadcasting, the Commission has asserted that the "public interest" requires that television be used to develop an "informed public opinion through the (public) dissemination of news and ideas concerning the vital issues of the day." Editorializing by Broadcast Licensees (Report of the Commission), 13 F.C.C. 1256, 1249 (1949) (quoted in Cass R. Sunstein, *Democracy and the Problem of Free Speech* 4 (1993)). In application, the law's concern with creating an "informed public opinion" has emphasized the importance of political debate, specifically political debate during campaigns. The Commission has long recognized that

[4] Congress explicitly turned to the public interest obligations to fend off efforts to make the broadcasters pay for their exclusive access to the new digital spectrum. *See, e.g.* 142 Con. Rec. H1145-46, H1167 (statement of Rep. Billy Tauzin) ("The issue of broadcast spectrum is tied up with something called the public interest standard. It has to do with the trade we made a long time ago to licensed broadcasters who operate under the public interest standard . . . .").

[5] The regulation of children's broadcasting is quite extensive. For instance, broadcasters are limited in the number of commercials they can present during children's programming. *See* 47 U.S.C. § 303a(b).

"political broadcasting" was one of the "basic elements necessary to meet the public interest, needs and desires of the community." *CBS v. FCC*, 453 U.S. 367, 378 (1981) (quoting Report and Order: Commission Policy on Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1087-88 (1978)).

Congress has instituted a number of requirements, demonstrating that it also considers political broadcasting to be at the core of the broadcasters' public interest obligation. First, when a broadcaster permits any political candidate (federal, state, or local) to use its broadcasting station, the broadcaster must provide "equal opportunities to all other such candidates for that office." 47 U.S.C. § 315(a). Indeed, this equal opportunity requirement has been a part of the law since 1927. Second, Section 312(a)(7) obligates broadcasters, as a condition of their licenses, to "allow reasonable access to or to permit purchase" of broadcast time by legally qualified candidates for federal office. Third, when a broadcaster sells time to candidates during specified periods preceding primary and general elections, the rate must be set at "the lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. § 315(b).

The general public interest standard and each of these specific statutory requirements "reflect[] the importance attached to the use of public airwaves by political candidates." *CBS v. FCC*, 453 U.S. at 386. The purpose of the political broadcasting mandate as it exists in the public interest standard and the statutory requirements is to "facilitate political debate over radio and television." *See, e.g., Farmers Educ. and Coop. Union v. WDAY*, 360 U.S. 525, 534 (1959). A free time requirement would represent a substantial step toward assuring that broadcasters are fulfilling their public interest obligation and that the 1934 Act's goal of creating an informed public is met.

II. A FREE TIME FOR CANDIDATES REQUIREMENT FITS PROPERLY WITHIN THE FCC'S REGULATORY AUTHORITY.

The Commission has "expansive" authority to require licensees to "give adequate and full attention to public issues." *Red Lion*, 395 U.S. at 393. This expansive authority includes the broad discretion to impose technical, structural, *and* program-related conditions. *See id.; see also, NBC v. United States*, 319 U.S. 190, 215 (1943) (the FCC is more than a "traffic officer, policing the wave lengths to prevent stations from interfering with each other"). The Commission's authority and discretion are guided by Congress's determination that the private sector should be permitted to use the spectrum, but that this use must accord with the public interest.

"[T]he public interest language of the [1934] Act authorized the Commission to require licensees to use their stations for discussion of public issues, and . . . the FCC is free to implement [these requirements] by reasonable rules and regulations . . . ." *Red Lion*, 395 U.S. at 380-81. By enacting the reasonable access, equal opportunity, and lowest unit charge requirements discussed above, Congress has made it clear that securing access to the airwaves for political candidates and campaign debate is one of the core elements of the public interest obligation. *See* 47 U.S.C. §§ 312(a)(7), 315 (a), (b); *see generally, CBS v. FCC*, 453 U.S. at 386 (recognizing that the public interest standard and the specific statutory requirements "reflect[] the importance" Congress attached to preserving access to the airwaves for candidate speech).

These statutory requirements, however, do not represent the limit of the Commission's authority to enhance and refine the broadcasters' obligations to air campaign and candidate discourse. While the specific commands of sections 312(a)(7), 315(a), and 315(b) are evidence of the seriousness with which Congress views this issue, a much broader mandate for the

presentation of political broadcasting inheres in the public interest standard of the 1934 Act. *See, e.g., CBS v. FCC*, 453 U.S. at 379 n.6 (recognizing that the public interest standard continues to obligate broadcasters to provide coverage of local and state political campaigns although Section 312(a)(7) explicitly mandates access for federal candidates). In *Red Lion*, for instance, the Supreme Court upheld the Commission's power to mandate *free* reply time for editorial and personal attacks under the public interest standard. *See* 395 U.S. at 379. In upholding the "fairness doctrine" — rules and policies developed by the Commission — the Court explicitly recognized that the Commission's authority under the public interest standard is not precluded by more specific Congressional legislation in the area. *See id.* at 385; s*ee also, Kennedy for President Comm. v. FCC*, 636 F.2d 432 (D.C. Cir. 1980) (recognizing that the explicit access requirements of the equal opportunity and reasonable access provisions do not preclude a candidate access requirement under the general public interest doctrine).

The Supreme Court's decision in *CBS v. DNC*, 412 U.S. 94 (1973), is particularly instructive on the extent of the Commission's authority and the deference that it should be shown. There the Court affirmed the Commission's decision not to create a general right of access for groups or individuals to buy time for editorial advertisements, but the Court made clear that the Commission has the authority to create such a right even though there was evidence in the record that Congress had rejected similar proposals. "The point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require." *CBS v. DNC*, 412 U.S. at 122.[6]

[6] The Court in *DNC* also noted, "Conceivably at some future date Congress or the *Commission* — or the broadcaster — may devise some kind of limited right of access that is both practicable and desirable." 412 U.S. at 131 (emphasis added).

Within this broad mandate, the Commission is clearly free to make new regulations under the public interest standard when it finds a deficiency in industry performance. "[T]he Commission is not powerless to insist that [broadcasters] give adequate and fair attention to public issues," nor must the government "stand idly by and permit those with licenses to ignore" the important public debate that occurs during campaigns. *Red Lion*, 395 U.S. at 393-94. Instead, the Commission must "adjust and readjust the regulatory mechanism to meet changing problems and needs." *CBS v. DNC*, 412 U.S. at 118; *Red Lion*, 395 U.S. at 394.

The plummeting coverage of campaigns by the networks and local broadcasters — combined with the soaring cost of advertising on broadcast television — demonstrates a significant failure by the industry to fulfill this crucial aspect of its public interest obligation. This deficiency is especially severe as it relates to local and state elections. In California, for instance, the local news shows in the state's five biggest media markets devoted 0.5 percent of their time to covering the hotly contested race for governor in the three months leading up to the 1998 election. *See* Morton Kondracke, *Will TV Stations Stop Profiteering from Politics*, Roll Call, Nov. 8, 1999 (citing study by Annenberg School for Communications at the University of Southern California). In some television markets, local and state races receive no coverage at all. *See What's Local about Local Broadcasting*, A Report by Benton Foundation and Media Access Project (April 1998) <http://www.benton.org>.

These critical deficiencies demonstrate that the FCC must step in to correct the industry's failure. The dearth of candidate-centered broadcasting during elections — particularly at the local level — creates serious problems for the functioning of our democracy. *See, e.g., CBS v. FCC*, 453 U.S. at 396 (stressing that access to broadcast time for candidates is vital to the electoral

process and the First Amendment). A free time requirement is a reasonable and proper step toward remedying this problem.

III. A REQUIREMENT OF FREE AIR TIME FURTHERS IMPORTANT FIRST AMENDMENT RIGHTS WITHOUT IMPROPERLY INFRINGING ON THE RIGHTS OF BROADCASTERS.

Both broadcasters and the public have First Amendment rights that must be balanced when the government seeks to regulate access to the spectrum. *See, e.g., CBS v. DNC*, 412 U.S. at 102-03, 110. The Supreme Court has long recognized that in striking the balance between the rights of the broadcasters and the public, the government must "seek to assure that the public receives through [the broadcast] medium, a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." *FCC v. League of Women Voters of Calif.*, 486 U.S. at 375. In fact, in this area, it is the First Amendment rights of the public that are "paramount," *Red Lion*, 395 U.S. at 390, and that should be "[the] foremost concern" of any regulation of the spectrum. *CBS v. DNC*, 412 U.S. at 122.

A free time requirement would further the important First Amendment values that underlie the 1934 Act's public interest requirement and would ensure that the FCC's regulatory scheme furthers the First Amendment rights of the public. In addition, a free time requirement would not unconstitutionally infringe on the First Amendment right of the broadcasters.

A. A Free Time Requirement Furthers Important First Amendment and Democratic Values.

There is a powerful democratic interest in ensuring "that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976). Indeed, the nation's most significant democratic debate takes place around elections — national, state, and local. It is during this time that issues come to the fore and are debated with specificity. And, obviously, it is during this time that the public chooses who will represent them in their government. The values at issue in enhancing the speech during the election season are "'the essence of self-government.'" *CBS v. FCC*, 453 U.S. at 396 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

When the government acts to facilitate candidate speech and the ability of the public to hear that speech, it is furthering an important First Amendment interest and, as such, is furthering an important and valid government interest. The Supreme Court has long recognized the government's interest in maintaining "the opportunity for free political discussion to the end that government may be responsive to the will of the people" as "a fundamental principle of our constitution." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). "[T]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *CBS v. FCC*, 453 U.S. at 396 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Recognizing the critical nature of the government's interest in furthering speech during elections, the Supreme Court has approved of "a congressional effort . . . to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," even though the award of the money was linked with certain restrictions. *Buckley v. Valeo*, 424 U.S. at 92-93.

Indeed, the Supreme Court's decisions in *Red Lion* and *CBS v. FCC* stress the First Amendment values of a regulation that enhances electoral speech. In considering the constitutionality of the fairness doctrine regulations, the Court in *Red Lion* extolled the rule's contribution to robust political debate and emphasized the government's role in furthering the "First Amendment goal of producing an informed public capable of conducting its own affairs." 395 U.S. at 392. Similarly in *CBS v. FCC*, the Court's finding that the reasonable access requirements enhanced the flow of information during campaigns and furthered the First Amendment interests of the "candidates and voters" was critical to its decision to uphold the rule. 453 U.S. at 396.

Like the access requirements upheld in *CBS v. FCC*, a free time requirement would "make a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary to the effective operation of the democratic process." 453 U.S. at 396. The requirement, thus, would further the important First Amendment values of robust speech and debate that are critical to a functioning democracy. But even more importantly, as less and less broadcast time is being devoted to campaigns as a part of regular news programming, a free time requirement would safeguard the critical democratic value in having a voting public informed and educated on the issues of the day.

B. A Free Time Requirement Does Not Improperly Restrict the First Amendment Rights of Broadcasters.

Of course broadcasters have First Amendment rights relating to their broadcasts, and the government — both the Commission and Congress — must respect those rights. But because of the unusual relationship between the government and broadcasters, *see* Section I, *supra*, the

regulation of the broadcast industry presents an "unusual order of First Amendment values." *CBS v. DNC*, 412 U.S. at 101. For instance, it is widely recognized that "efforts to 'enhance the volume and quality of coverage' of public issues through regulation of broadcasting may be permissible where similar efforts to regulate print media would not be." *Buckley v. Valeo*, 424 U.S. at 50-51, n. 55, (quoting *Red Lion*, 395 U.S. at 393, and comparing with *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (invalidating mandatory reply obligations as they apply to newspapers)). Simply put, broadcasters have "no unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion*, 395 U.S. at 388.

The scope of broadcasters' First Amendment rights as limited by their trustee position — their bargain with the government — is highlighted in the Supreme Court decisions in this area. "There is *nothing* in the First Amendment which prevents the government from requiring a licensee to share his frequency with others." *CBS v. FCC*, 453 U.S. at 395 (quoting *Red Lion*, 395 U.S. at 389)) (emphasis added). The "licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'" *CBS v. DNC*, 412 U.S. at 119 (plurality). It is not a violation of the First Amendment to require licensees, public trustees "given the privilege of using scarce radio frequencies," to act "as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Red Lion*, 395 U.S. at 394.

In considering whether a reasonable free time requirement would be an unconstitutional infringement of broadcaster speech, it is instructive to consider the concept in its historical and factual context by looking to the broadcasting regulations that the Supreme Court has already upheld as constitutional. In *Red Lion*, the Court found that the restrictions of the fairness

doctrine did not result in an unconstitutional infringement on broadcasters' First Amendment rights, even though the rules forced broadcasters to afford opportunities for replies to political editorials and personal attacks aired by the stations. *See* 395 U.S. at 400. Indeed, the rules required broadcasters to seek out those attacked and if the subject of the attack could not pay for the response time, it had to be provided for free. The Court upheld the rule despite the broadcasters' insistence that it unreasonably burdened their editorial discretion.

In *CBS v. FCC*, the Court upheld a requirement that created an "affirmative, promptly enforceable right of reasonable access" to broadcast stations for federal political candidates. 453 U.S. at 377. In addition, the Commission — not the broadcasters — had the authority to determine when a political campaign had begun, triggering the right to access. 453 U.S. at 388. The Supreme Court found that these requirements did not violate "the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion," *id.* at 394, but "properly balanced the First Amendment rights of federal candidates, the public, and broadcasters." *Id.* at 397.

Similarly, a free time requirement would properly balance those rights. Indeed, it is likely to be less burdensome and less likely to interfere with the editorial discretion of broadcasters than either the fairness doctrine or the reasonable access requirement. A free time requirement would only require that a certain amount of time (or spectrum space) be set aside during a limited time-period for candidates to address the public; its dictates would not necessarily involve the broadcasters' use of their own programming time.

The authority of the First Amendment doctrine laid out in *Red Lion* and reiterated in almost all other broadcast cases remains strong despite arguments that the "scarcity rationale" has lost its vitality and should no longer be good law. *See, e.g., FCC v. League of Women Voters*,

468 U.S. at 376 n.11 (noting an increasing criticism of the scarcity rationale but declining to reconsider the approach). More recently the Court has been asked to revisit the scarcity rationale in light of the apparent proliferation of information outlets brought by the cable and satellite industries, but the Court has declined to do so. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 638-99 (1994).

While changes in communications technology may have increased the number of possible communications outlets, *Red Lion's* scarcity justification for regulating broadcasters remains strong. The scarcity rationale is inextricably bound with the regulatory structure that has developed to date and the 70-year system giving preference to existing broadcasters, as discussed in Section I, *supra*. This system of preference and obligation has not changed and continues to create a system of scarcity justifying the regulation of broadcasters. As *Red Lion* recognized:

> [E]xisting broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the government.

Red Lion, 395 U.S. at 400.

The provisions of the Telecommunications Act of 1996 demonstrate that the reasoning underlying the "scarcity rationale" should have a long life in the regulatory structure. The Act secured for existing broadcasters an exclusive right to any licenses issued for the digital spectrum. Thus, while the digital spectrum may create more outlets for communication, a handful of incumbent broadcasters will continue to control access to those outlets. This scarcity of gatekeepers and content providers affirms the vitality of the scarcity justification for regulating

broadcasters. After all, the scarcity rationale supported regulation because the Court was concerned that in the absence of regulation a few voices would dominate the airwaves. *See Red Lion*, 395 U.S. at 392 (expressing concern that "station owners and a few networks" could make time available "only to the highest bidders . . ."). *See also, FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (public interest standard requires attempt to "achiev[e] 'the widest possible dissemination of information from diverse and antagonistic sources'" (quoting *Associated Press v. United States*, 326 U.S. at 20). Technological advances have not allayed this fear.

IV. A FREE AIR TIME REQUIREMENT DOES NOT CONSTITUTE A FIFTH AMENDMENT "TAKINGS"

Because broadcasters have no right to the grant of a license or "property interest" in the use of a particular frequency, the regulation requiring them to set aside time for candidates does not give rise to a takings under the Fifth Amendment to the Constitution. Applicants for a license expressly waive any claim to the use of any particular frequency or the use of the spectrum because of previous use of the frequency. 47 U.S.C. § 304. Early Supreme Court decisions made this even clearer, stating, "no person is to have anything in the nature of a property right as a result of the license." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). Instead, broadcasters are granted a license to use the spectrum in accord with certain conditions — such as serving the public interest. Because the free time requirement is a refinement of the public interest obligation already attached to the license, it cannot be construed as a "taking" that has unconstitutionally reduced the value of their license.

In addition, as discussed above, broadcasters have just received free access to additional spectrum space, and in awarding the new licenses, the FCC placed broadcasters on notice that "the Commission may adopt new public interest rules for digital television." *Fifth Report and Order*, 12 F.C.C.R. at 12830. Thus, broadcasters who agree to accept the new licenses have no argument that a free time requirement unfairly burdens their use of the license.

CONCLUSION

In managing the transition to digital technology, the Commission has no more important task than ensuring that broadcasters contribute to the development of a well-informed electorate. The free time requirement would constitute a substantial step in this development. It is well within the Commission's authority, it furthers the First Amendment rights of the public, and it does not interfere with the First Amendment rights of broadcasters.

Thus, we respectfully urge the Commission to use its expertise to determine the most effective way of structuring a free time requirement and then to issue a Notice of Proposed Rulemaking on this issue.

Respectfully submitted,

Elizabeth Daniel
Brennan Center for Justice
at New York University School of Law
Counsel for the Alliance for Better Campaigns, *et al*.
161 Avenue of Americas
Suite 500
New York, New York 10013
(212)998-6730

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